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**Before the**

**FEDERAL COMMUNICATIONS COMMISSION**

**Washington, D.C. 20554**

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| In Re Applications of | ) | MM Docket No. 93-75 |
| | ) | |
| TRINITY BROADCASTING OF FLORIDA, INC. | ) | BRCT-911001LY |
| | ) | |
| For Renewal of License of Television Station WHFT(TV) Miami, Florida | ) | |
| | ) | |
| GLENDALE BROADCASTING COMPANY | ) | BPCT-911227KE |
| | ) | |
| For Construction Permit Miami, Florida | ) | |

To: The Commission

**OPPOSITION TO**
**PETITION FOR RECONSIDERATION**


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May 20, 1993

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## SUMMARY

The Petitioners seek reconsideration of the hearing designation order (HDO), contending that not just the license of WHFT(TV), but all of the Trinity and NMTV licenses, should be designated for hearing.

As a threshold matter, the petition must be dismissed as to Petitioner LULAC, which has heretofore not participated in this proceeding. LULAC has failed to show the requisite good cause under §1.106(b)(1) for its failure to participate earlier.

The Petition must be dismissed in any event, because (with one exception not applicable here) petitions for reconsideration of hearing designation orders will not be entertained. The Grayson determination in the HDO is not "final" in any sense that would justify reconsideration, and the authorities relied upon by Petitioners are inapposite.

Even if the Petition were entertained, it would have to be denied on the merits. Petitioners are wrong in claiming that the HDO departs from Commission policy. Petitioners misstate the nature of the finding the Commission must make in order to leave the "other licenses" unrestricted. The finding in the HDO was fully consistent with Commission policy. Furthermore, contrary to Petitioner's contention, the Commission's Grayson determination here is amply justified by the public interest considerations on which the Grayson policy is premised.

Accordingly, the Petition must be dismissed, and if not dismissed, then denied.

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Trinity Broadcasting of Florida, Inc. ("TBF"), by its counsel, hereby opposes the "Petition for Reconsideration" filed May 7, 1993, by Spanish American League Against Discrimination ("SALAD") and League of United Latin American Citizens ("LULAC") (collectively, the "Petitioners"). In support hereof, TBF respectfully states as follows:

## A. Background

1. The Petitioners ask the Commission to reconsider certain aspects of the hearing designation order, which set the license renewal application of WHFT(TV), Miami, Florida, for hearing on issues involving alleged de facto control and abuse of process by TBF's affiliate, the Trinity Broadcasting Network

("TBN"), and National Minority TV, Inc. ("NMTV"). Hearing Designation Order, FCC 93-148, released May 7, 1993 ("HDO").

2. The Commission declined in the HDO to call for early renewals or institute revocation proceedings against all NMTV, TBN, or affiliate licenses. Likewise, it declined to restrict the free transferability of those licenses, or to bar the acquisition of new licenses, during the pendency of this proceeding. To the contrary, the Commission expressly ruled that those entities "are free to dispose of licenses" and that they "may also acquire licenses" while the issues in this proceeding are heard. At the same time, the Commission stated that if the issues here are resolved against NMTV, TBN, or its affiliates, the Commission would then determine what actions might be appropriate in connection with the other stations. HDO, ¶45.

3. The Petitioners complain that the Commission should have called all of the licenses for early renewals, designated the same issues against all of them, and barred NMTV, TBN, or its affiliates from freely transferring any of their licenses during the course of the proceeding.[1/] According to the Petitioners, the course chosen by the Commission departs from agency policy, ignores statutory mandate, and is not supported with reasons adequately articulated in the HDO.

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1/ The Petitioners do not urge that the acquisition of new licenses be barred while this proceeding is pending.

4. As shown below, the Petition must be dismissed as procedurally defective, and if not dismissed then denied on the merits. With one exception not applicable here, the Commission's rules preclude reconsideration of a hearing designation order. In any event, there is no merit to the Petitioners' contentions, because the determination made in the HDO concerning other licenses is fully in keeping with Commission policy and is amply justified in the public interest.

B. **The Petition Must Be Dismissed as to LULAC**

5. We note at the outset that the Petition must be dismissed as to LULAC, which has not previously participated in the proceeding. Section 1.106(b)(1) of the Rules states that a petitioner who is not a party must show "good reason why it was not possible for him to participate in the earlier stages of the proceeding." 47 C.F.R. §1.106(b)(1). LULAC has not made the requisite good cause showing.[2/]

6. LULAC tries to justify its late arrival by claiming it had no prior interest in the proceeding because its members suffered no injury until the Designation Order was issued.

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2/ LULAC includes with the Petition an absurd Declaration from one Patricia Vasquez of Miami, Florida, a LULAC member, stating that "it was not possible for me to participate" earlier in the proceeding because "I could not have known that the designation of the TBF [WHFT] license for hearing would affect my ability to challenge the license of the TBN affiliate in my area." WHFT is the TBN affiliate in her area.

Petition, p. 2, n. 2. That argument proves too much. By definition, nobody is injured by a Commission action until the Commission takes the action. Thus, LULAC's theory would give any aggrieved latecomer an unqualified right to reconsideration. Since that would effectively repeal the good cause requirement, it is hardly a compelling good cause argument.

7. As further justification, LULAC says it "could not have foreseen" that the Commission in the HDO would "modify [its] traditional application of the Grayson and Jefferson Radio policies." Ibid. That contention, too, lacks any merit. LULAC had no reason to be "surprised" in this case because the HDO did not in fact modify or misapply Commission policies (see ¶¶15-26 below). More fundamentally, however, a claim of surprise at the outcome of a Commission decision "is no basis for a new party to file a petition for reconsideration." Press Broadcasting Company, 3 FCC Rcd 6640 (1988); KRPL, Inc., 5 FCC Rcd 2823 (1990) (petitioner claimed it did not foresee change in FCC rules that permitted grant of applicant's application); Concord Telephone Exchange, Inc., 56 RR 2d 653, 656 (1984) (petitioner claimed it could not have foreseen "significant change in Commission policy" and "novelty" of FCC's order); Simon Geller, 91 FCC 2d 1253, 1254-55 (1982) (petitioner claimed it had been confident FCC would decide case differently), aff'd sub nom. Committee for Community Access v. FCC, 737 F.2d 74, 84 (D.C. Cir. 1984) ("if we were to require the Commission to accept

surprise as a sufficient justification for a new party to seek reconsideration, the Commission's -- and indeed the public's -- interest in finality of licensing decisions would be eviscerated").[3/]

8. Because LULAC has not shown the required good cause for seeking reconsideration of the HDO, the Petition must be dismissed as to LULAC.

### C. The Hearing Designation Order Is Not Subject to a Petition for Reconsideration

9. The Petition must be dismissed in any event because it will not be entertained under the Commission's rules. Section 1.106(a)(1) states:

> "A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding." 47 C.F.R. §1.106(a)(1) (emphasis added).

The HDO in this case does not rule adversely to either petitioner on the question of their participation in the proceeding. To the contrary, it expressly makes SALAD a party. HDO, ¶51. (It makes no ruling as to LULAC, of course, since LULAC did not surface until after the HDO was issued.) Hence,

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3/ LULAC's claim of "surprise" is suspect in any event, since the Petition cites but one case in which the Commission has designated all of a licensee's other licenses for hearing in a Grayson determination. James S. Rivers, 48 Fed. Reg. 8585 (1983). This is far more the exception than the rule.

there is no basis under the rules for the Commission to entertain this petition or to reconsider this designation order.

10. Over the years, the Commission has repeatedly dismissed petitions for reconsideration of hearing designation orders as barred by §1.106(a)(1). See, e.g., Black Television Workshop of Los Angeles, Inc., 4 FCC Rcd 3871, 3872 (1989); California Broadcasting Corp., 59 RR 2d 739, 740 (1985); WIOO, Inc., 68 FCC 2d 127, 128 (1978); Federal Broadcasting System, Inc., 60 FCC 2d 1036, 1038-39 (1976); Vue-Metrics, Inc., 60 FCC 2d 922, 923 (1976); Service Electric Cable TV, Inc., 51 FCC 2d 763, 764-65 (1975); Phone Mate, Inc., 48 FCC 2d 201, 205 (1974). See, also, Summary Decision Procedures, 34 FCC 2d 485, 491

reconsider it just as well then as now.[4/] Moreover, the Commission may always "take appropriate action against the broadcaster's other stations at a later point if the circumstances warrant." Grayson Enterprises, Inc., 79 FCC 2d 936, 940 (1980). Therefore, the Petitioners' call for early renewal applications is wholly unwarranted. Indeed, in characterizing the determination on other licenses in the HDO as already "final," Petitioners completely distort the concept of legal finality.[5/]

12. Equally misplaced is Petitioners' reliance on the very

delay starting the hearing while such a petition was pending before the full Commission. In Lamar Life Insurance Co., 5 FCC 2d 37 (1966), reconsideration related primarily to key points of procedure concerning the conduct of the hearing (e.g., burden of proof, Bureau participation), and the Commission expressly warned that "[t]his should not be construed as a precedent for . . . any case involving less compelling circumstances." Id. at 38. In Fidelity Radio, Inc., 1 FCC 2d 661 (1965), the petition was entertained only because it was filed before the current prohibition in §1.106(a)(1) took effect. And in Naugatuck Valley Services, Inc., 3 FCC 2d 642 (Rev. Bd. 1966), the Review Board allowed a petition for reconsideration only because the Board had added an issue sua sponte and thereby deprived the parties of any chance to be heard; in the instant case the parties had the opportunity to address the "other licenses" question at the petition-to-deny stage (and SALAD did address it).[6/]

13. Because the instant Petition for Reconsideration cannot be entertained under §1.106(a)(1), it must be dismissed.

D. **The Petition Must Be Denied on the Merits**

14. Even if the Petition were entertained, however, Petitioners' substantive arguments must be rejected as without merit.

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6/ See SALAD's Petition To Deny, filed January 2, 1992, p. 5.

(1) **The HDO Does Not Depart from Policy**

15. Petitioners contend that under current policy the Commission must restrict all the licenses unless it makes an "affirmative determination" that the other stations were not involved in the alleged misconduct. Further, say Petitioners, if the Commission finds that the allegations "possibly" affect the transferability of the other stations, all licenses must be restricted. According to Petitioners, the Commission violated such policy here because its finding fell short of what was required: rather than "affirmatively" finding that the other stations were not involved, the Commission merely said it was "not prepared, at this time, to conclude" that the designated issues "would" affect the licensees' qualifications to hold other licenses (HDO, ¶45). Petition, pp. 9-11.

16. In two respects the Petitioners' argument fundamentally misstates Commission policy as to the finding required. First, the test is not whether the allegations "possibly" affect the other stations, but whether there is a "substantial likelihood" of that. "The basic issue is whether there is a substantial likelihood that the allegations warranting designation of one station for hearing bear upon the operation of other stations." Grayson Enterprises, Inc., supra, 79 FCC 2d at 940 (emphasis added); Transferability of Licenses, 53 RR 2d 126 (1983) (reiterating "substantial likelihood" test); Straus Communications, Inc., 2 FCC Rcd 7469 (¶4) (1987) (finding

"no substantial likelihood"); RKO General, Inc., 1 FCC Rcd 1081, 1085 (¶22) (1986) (finding "no substantial likelihood") (emphasis in original).[7/]

17. Second, in order to leave the other licenses unrestricted, the Commission need not affirmatively find that the allegations would not bear on the operation of the other stations. The other licenses will remain unrestricted unless the Commission finds that the allegations would bear on the operation of the other stations. In other words, the other licenses will be restricted "only if 'there is a substantial likelihood that the allegations warranting designation of one station for hearing bear upon the operation of other stations.'" Straus Communications, Inc., supra, 2 FCC Rcd at 7470 (¶6), quoting Grayson Enterprises, Inc., supra, 79 FCC 2d at 940 (emphasis added). Indeed, the Commission made explicitly clear in Straus that "there [is no] requirement that an affirmative finding of transferability be made;" the other licenses are freely transferable "absent an express limitation on [their] transferability." Straus Communications, Inc., supra, 2 FCC Rcd at 7470 (¶6).

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7/ Petitioners claim a "possibly affect" test by citing language from a 1983 hearing designation order quoted in Character Qualifications, 102 FCC 2d 1179, 1224 (1986). Petition, p. 9. However, Petitioners fail to note that in the ensuing paragraph the Commission framed the test as whether the allegations involve conduct "likely" to impact the other stations. 102 FCC 2d at 1225. As proven by the cases cited above, the Commission has consistently applied a "substantially likely" test.

18. In the instant case, therefore, the Commission correctly applied the Grayson policy when it said it was "not prepared, at this time, to conclude" that the designated issues "would affect" the other licenses. HDO, ¶45. Since it was unable to find a substantial likelihood that the allegations bear upon the operation of the other stations, the Commission properly under Grayson left the other station licenses unrestricted.[8/]

19. The Petitioners are likewise mistaken in suggesting that the Commission's action here violates the policy of Jefferson Radio, Inc. v. FCC, 340 F.2d 781 (D.C. Cir. 1964). Petition, pp. 12-14. That contention ignores the fact that the Jefferson Radio policy is limited and qualified by the Grayson policy. When, as here, the Commission (applying Grayson) is unable to find that the other licenses are substantially likely to be implicated, then the Jefferson Radio restriction does not apply to those licenses. That is the whole point of Grayson. The Petitioners gain nothing by claiming that the [redacted]

could be said of any case in which the Commission has declined under Grayson to restrict other licenses. Thus, what the Petitioners are really contending is not that this HDO should be reconsidered, but that the Grayson policy itself should be repealed.[9/]

### (2) The Determination in the HDO Is Supported by Public Interest Considerations

20. The Grayson policy is premised on the Commission's determination that several public interest factors generally militate in favor of leaving uninvolved licenses unrestricted. First, "the possible loss of a single station may provide sufficient deterrence to other licensees." Moreover, prolonged operation of a station that has been placed under a cloud of uncertainty "may result in a deterioration of service to the community." Grayson Enterprises, Inc., supra, 79 FCC 2d at 939. In addition, free transferability facilitates the departure from broadcasting of "licensee[s] that may not have the requisite

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[9/] Petitioners' assertion that TBN, TBF, or NMTV will improperly "profit" from any sale is similarly misplaced. All are public charities operated to further nonprofit purposes -- not business enterprises focused on profit or personal gain. Noe v. FCC, 260 F.2d 739 (D.C. Cir. 1958) ("the Commission has always recognized the necessity of distinguishing non-business organizations from the ordinary stock corporation"). Moreover, contrary to Petitioners' claim that "Trinity has already illicitly profited from the sales of KMLM-TV and WLXI(TV)" (Petition, p. 14), neither NMTV in the case of KMLM-TV, nor Trinity in the case of WLXI(TV), sold the station for more than it had invested to purchase the authorization and upgrade the station's service.

qualifications." RKO General, Inc., supra, 1 FCC Rcd at 1085 (para. 23).

21. These considerations are always present, and they always favor leaving uninvolved licenses unrestricted. Because these public interest factors are inherent in the Grayson policy, the Petitioners are wrong to fault the Commission for not having expressly discussed them in the HDO. Petition, p. 15. Simply by invoking Grayson, the Commission amply identified the various intrinsic public interest considerations that warrant the "other licenses" determination made here.

22. Also without merit is Petitioners' claim that proper consideration of the public interest in this case would have led the Commission to designate the other licenses for hearing. Id. Petitioners assert three reasons for designating the other licenses: (1) that the alleged misconduct occurred at the top corporate level and not at particular stations (id., p. 16); (2) that the alleged multiple ownership and abuse of process violations by definition pertain to all of the licenses (id.); and (3) that failure to designate all the licenses undermines the goal of deterring wrongdoing (id., p. 17). These arguments are not persuasive.

23. The Commission in the past has declined to restrict the licenses of uninvolved stations even where the alleged misconduct was at the top corporate level and involved

misrepresentation or lack of candor. RKO General, Inc., supra, 1 FCC Rcd at 1085 (permitting assignment of WOR-TV where misrepresentation/lack of candor issues against licensee involved persons having duties "primarily with regard to overall corporate operations, not the day-to-day station operation of WOR-TV"); Cellular System One of Tulsa, 102 FCC 2d 86 (1985) (cellular applicant held qualified for grant despite findings that corporate parent made misrepresentations and lacked candor in matters involving other licenses); Grayson Enterprises, Inc., supra (designation of lack of candor/misrepresentation issues does not warrant restricting licenses of uninvolved stations).

24. Moreover, contrary to Petitioners' contention, the alleged multiple ownership rule violation here does not inherently implicate all the other licenses. At most, it implicates only two licenses, since TBN never allegedly owned/ controlled more than 14 stations, two over what its limit would have been if the minority exception had not applied. HDO, n. 5. (Indeed, no violation is even alleged from and after December 1991. Id.). In claiming that all of the other licenses are

Enterprises, Inc., supra, 79 FCC 2d at 939; RKO General, Inc. (KHJ-TV), 3 FCC Rcd 5057, 5062 (1988) (loss of one station is a "severe penalty"). Any well-publicized taking of a valuable broadcast license -- even just one -- plainly gets the attention of broadcasters with licenses to lose, and Petitioners cannot seriously suggest otherwise. The deterrence is particularly strong here, where the license at issue involves a television station in the nation's 15th largest television market.

26. Finally, there is no good reason to accept the argument that all the other licenses should be designated because "viewers and listeners cannot be expected to monitor and represent themselves in renewal and revocation proceedings for broadcast licenses all over the country on the suspicion that a licensee who owns or controls a local broadcast station will be afforded a final, conclusive presumption that the local station is untainted." Petition, p. 18. To this there are two answers. First, "viewers and listeners" suffer no greater imposition in this regard than anyone else; everybody potentially affected by a Commission proceeding must be alert to public notice of such a proceeding. Second, in this case Petitioner SALAD did represent the interests of other "viewers and listeners" from the outset, arguing in its petition to deny that all of the TBN and NMTV licenses should all be designated for hearing. This refutes the claim that "viewers and listeners" have no realistic way to monitor and participate in a Grayson determination that

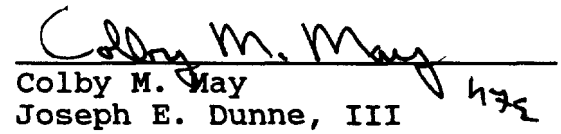
might affect them. It also proves that even if Petitioners' contention had merit as a general proposition, in this case there is no basis for the relief requested.

## E. Conclusion

27. In sum, the Petition for Reconsideration must be dismissed because, in seeking reconsideration of a hearing designation order, it is barred by §1.106(a)(1). Even if accepted and considered on the merits, however, the Petition must be denied. The "other licenses" determination in the HDO is fully consistent with the Commission's Grayson policy and is more than adequately justified by the public interest factors on which that policy is premised.

Respectfully submitted,

TRINITY BROADCASTING OF FLORIDA, INC.

By: 
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May 20, 1993

## CERTIFICATE OF SERVICE

I, Joan M. Trepal, a secretary in the law firm of Mullin, Rhyne, Emmons and Topel, hereby certify that on this 20th day of May, 1993, copies of the foregoing "Opposition to Petition for Reconsideration" was sent by first class mail, postage prepaid, to the following:

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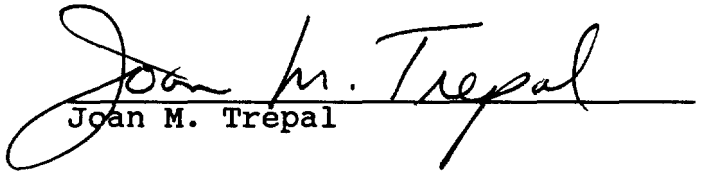

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